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Before The  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

In the Matter of ) MM Docket No. 99-331  
 )  
Amendment of Section 73.202(b) ) RM-9848  
Table of Allotments )  
FM Broadcast Stations )  
(Madisonville, and )  
College Station, Texas) )

To: Assistant Chief,  
Audio Division  
Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

REPLY TO OPPOSITION TO  
PETITION FOR RECONSIDERATION

On February 20, 2003, Garwood Broadcasting Company of Texas (hereinafter "Garwood") filed a Petition for Reconsideration of the Report and Order (DA 03-144) that had been issued by the Chief of the Audio Division of the Media Bureau in this Docket on January 21, 2003, which denied the Garwood petition for rulemaking (RM-9848). The Petition for Reconsideration was filed pursuant to 47 CFR 1.429 and published by the Commission on March 5, 2003 (Public Notice Report No. 2597) and as recognized there, a period of 15 days was provided by 47 CFR 1.429 for filing of any Opposition, the time commencing upon publication of notice of the petition in the Federal Register, with a reply date calculated as "...ten days after the time for filing of oppositions has expired."

Notice of the Petition appeared in the Federal Register on March 11, 2003 (68 Fed Reg 47, 11553) and the date for oppositions calculates to March 26, 2003, with the date for any //

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Reply set at April 9, 2003, (ten days after the opposition date plus 3 days for mailing of service as provided in 47 CFR 1.4 (h). The instant Reply is therefore timely filed.<sup>1/</sup>

The basis of Garwood's petition was clearly stated in the petition as filed and was, with but one exception, premised upon the Commission's misapplication of current law and policy to the existing facts of the case. The exception related to a new fact that occurred after the release of the Report and Order, that being an application filed by Sandlin Broadcasting Co.

(hereinafter "**Sandlin**") proposing a short-spaced use of channel 273C1, raising, for the first time, an alternate way for proceeding in this case, should the Commission determine that Sandlin deserves any further consideration in the matter (See Petition for Reconsideration, Section 5, pages 20 to 22, and footnotes 5 and 6). As a new fact arising after the decision in the case and relevant to that decision, it was properly raised on reconsideration, Warmack Communications, 3 FCC Rcd 2526 (1986).

The most essential argument raised on reconsideration was that the Commission's action in giving further consideration to Sandlin despite the fact that the record conclusively establishes that Sandlin had broken several prior representations to the Commission in both rulemaking and application proceedings to have channel 273C1 assigned and then to obtain a **construction permit** for its use, and had instead warehoused the channel unused for a

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<sup>1/</sup> The Reply is actually being filed several days early in the hopes of expediting consideration of the Garwood petition to the extent possible.

period of over 12 years. Garwood suggested that giving any further consideration to Sandlin was flatly contrary to clearly expressed congressional concern and intent that such warehousing of radio frequencies was patently contrary to the public interest and should not be countenanced, let alone encouraged. It is interesting to note that Sandlin in its Opposition did not dispute its past history with channel 273C1 at all, nor did it address or dispute in any way the argument presented on that matter. 2/

Sandlin notes on page 2 of its Opposition that Roy E. Henderson, principal of Garwood Broadcasting, is also principal of the other licensees (in Hallettsville, Edna, and Palacios) proposed for changes in the Garwood petition, and all of which have agreed to the proposed changes, but does not suggest any adverse inferences to be drawn from that fact. To the contrary, the common ownership guarantees that all proposed changes are acceptable and will be fully implemented. Later, at page three of the Opposition, Sandlin complains about an application filed by the licensee of KTXM in Hallettsville to modify that station in a way that would accommodate the replacement of channel 273C1 with channel 259C1 in Bay City as an alternate solution that might be

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2/ It is noted that on page 2 of its Opposition, Sandlin accuses Garwood of "character assault" on Sandlin. We are aware of no such "character assault" and would disavow any such suggestion. What we **do** say is that Sandlin has clearly abused the Commission's processes relative to its acquisition and warehousing of channel 273C1 and that it should not be "rewarded" for those actions.

considered by the Commission (see Petition at Section V, pages 20 to 22).

Again, aside from indicating it did not like it, Sandlin offers on recognizable ground upon which to object to the application to modify facilities of KTXM in Hallettsville. To the best of the applicant's knowledge, the application is fully consistent with all engineering, coverage, and legal rules of the FCC applicable to its operation in Hallettsville and no waivers have been requested. It is also noted that the application was accepted for filing by the Commission in Public Notice No. 25436, March 6, 2003.<sup>1/</sup>

In its Opposition Sandlin also attacks the engineering basis of Garwood's suggested option of replacing channel 273C1 with 259C1 at Bay City, considering each to be operating under Section 73.215 of the commission's rules, consistent with the 73.215 proposal included in Sandlin's post-decision application for KMKS in Bay City. There are two points to comment on there. First of all, as to the sufficiency of the engineering, a full report clearly demonstrating that fact was included with the Petition for Reconsideration and is further addressed and re-verified in the Engineering Report attached hereto.

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<sup>1/</sup> It is noted here that Sandlin filed what it called a "Petition to Deny" the application on March 18, 2003, and appended a copy to its Opposition here. A "Petition to Deny" does not lie against a minor modification application such as KTXM's at Hallettsville, but even if considered as an "Informal Objection" it simply has no substance at all. The Hallettsville application is consistent with all FCC Rules and Regulations and should therefore be considered and granted in the normal course.

The second point is that even though the replacement of Sandlin's proposed short-spaced operation on 273C1 by replacement channel 259C1 would be fully equivalent with what Sandlin has most recently said it wanted to do &/, this switch was offered for consideration by the FCC as something that would work should the Commission, for some reason, still wish to accommodate Sandlin. The fact is that, given Sandlin's uncontroverted and still unexplained, abysmal record of performance in acquiring and warehousing channel 273C1 for over 12 years, we do not think that the Commission should accommodate Sandlin any more, and that it should not even reach consideration of this last option. We submit that the Garwood proposal should be adopted as submitted and Sandlin's license to operate KMKS modified to reflect its actual de facto operation as a class C2 station operating on a class C1 channel for the past 12 years. Given its past record in this proceeding, we think that would be a generous, if not undeserved, result for Sandlin from the Commission.

Lastly, to the extent that Sandlin refers to parts of the Garwood proposal (such as the removal of an FM channel from Edna, without much reference to the remaining 10 KW **AM** station licensed to and serving Edna, or the reduction in class at Palacios **from** C2 to A, but not the first services that would then be provided to Garwood (241A) and Sheridan (252C3) or the possibility that channel 252A in Columbus could then be upgraded to channel 273C1

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4/ Bearing in mind that this is precisely the same proposal it first offered in 1993, only to abandon the c.p. after it was issued.

in Columbus if the commission agreed to do so, it simply presents partial facts to seek to bolster its nonexistent argument.

The fact is that the Commission found the Garwood proposal as legally good and sufficient in its Reword and Order and that finding is not in dispute. To the extent that the Commission then applied inapposite rules and cases to find against adoption of the Garwood proposal and to support its conclusion that Sandlin deserved at least 'one more chance' to make some use of the channel 273C1 which it had kept and controlled, unused, for 12 years, that is in dispute here. That **is precisely** what is in dispute here.

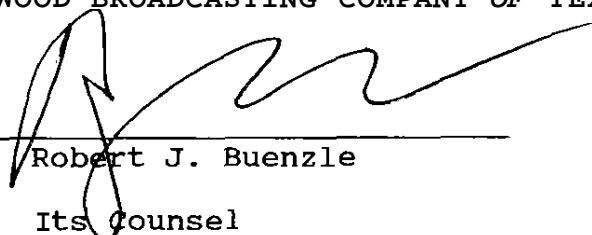
#### **VI. CONCLUSION**

Wherefore, it is respectfully submitted that the Opposition filed by Sandlin did not address the arguments raise din the Garwood Petition for Reconsideration and that, for the reasons stated therein, the Petition should be granted, the Report and Order DA 03-144, as issued January 21, 2003, reversed and vacated, and the Garwood petition adopted.

Respectfully submitted,

GARWOOD BROADCASTING COMPANY OF TEXAS

by



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Its Counsel

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April 7, 2003

## **Garwood Broadcasting Company of Texas**

### **Reply Comments Petition for Reconsideration MM Docket 99-331 April 2003**

#### **ENGINEERING STATEMENT**

This firm has been retained by Garwood Broadcasting Company of Texas, ("GBC") to prepare this engineering statement in support of its Reply Comments in this proceeding

#### **Summary**

On January 20, 2003, the Commission issued a Report and Order in this proceeding denying the GBC' proposal to amend the FM Table of Allotments. That Report and Order denied the GBC request for the assignment of first local service as well as enhanced FM service to a number of communities in favor of providing the licensee of Radio Station **KMKS(FM)**, Bay City, Texas an additional opportunity to apply for an upgraded channel that has laid fallow for a number of years. Following the issuance of the Report and Order, the licensee of Radio Station **KMKS(FM)** submitted an application for FM Channel 273C1, (short spaced, with 73.215 processing requested), at the present **KMKS(FM)** transmitter site.

In its Reconsideration Petition, GBC noted the application filing and submitted engineering data to conclusively demonstrate that **KMKS(FM)** could operate from its requested site on FM Channel 259C1, (also processed under Section 73.215 of the Commissions Rules), should that licensee wish to proceed with upgrading its facility.

#### **Discussion**

In its opposition to the GBC reconsideration request, the licensee of **KMKS(FM)** submitted engineering material' that simply **addressed the** wrong **issue** in this proceeding.

<sup>1</sup> See MM Docket 99-331 Report and Order adopted January 15, 2001 and released January 21, 2003.

<sup>2</sup> As has been the practice of the licensee of **KMKS(FM)** in this case, it did not supply an engineering statement and did not provide any qualification of the engineer providing the material.



The original proposal of GBC, and the subject of the reconsideration proposal, simply proposed the assignment of **FM** Channel 259C2 at the present transmitter site of **KMKS(FM)**. After the Commission issued its Report and Order, the licensee of Radio Station **KMKS(FM)**<sup>3</sup> filed a short spaced application on **FM** Channel 273C1 and is now claiming that the only way the Commission can replace that channel is to propose a fully spaced Class C1 at the **KMKS(FM)** proposed transmitter site. That claim is simply wrong.

The basis of the reconsideration petition of GBC was to point out that the Commission's action in this proceeding is inconsistent with the Telcom Act of 1996, and that the denial of the GBC proposal should be reversed. Further, in an attempt to show that Radio Station **KMKS(FM)** could operate from its present site, as proposed in its application, then **FM** Channel 259C1 could be assigned to Bay City, Texas, and if that assignment were made, then the licensee of **KMKS(FM)** could proceed to construct its proposed facility on that channel. The entire engineering material submitted by the licensee of Radio Station **KMKS(FM)** is based on the (incorrect) conclusion that GBC is requesting the assignment of **FM** Channel 259C1 as a replacement channel for the presently assigned **FM** Channel 273C1 at Bay City, Texas. The application for **FM** Channel 273C1 was filed after the Commission issued its Report and Order in this proceeding, and GBC is **seeking** to reverse that Order. GBC simply demonstrated that **FM** Channel 259C1 could be assigned to Bay City, Texas in compliance with all of the Commission's Rules should the licensee of **KMKS(FM)** wish to pursue a Class C1 facility and in order to accommodate that application GBC arranged to insure that the licensee of **KMKS(FM)** could proceed with its plan for a Class C1 facility without impediment.

The engineering portion of the **KMKS(FM)** response simply addresses an issue that is not relevant to the reversal of the Order. Should the licensee of **KMKS(FM)** seek to operate a Class C1 facility it can do so on **FM** Channel 259C1 as well as on **FM** Channel 263C1 with the same technical specifications, all in full compliance with all of the Commission's **Rules**. **All** of the engineering statements and exhibits submitted by GBC have shown that the request of GBC is reasonable, that the GBC proposal

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<sup>3</sup> FCC File No. BPH-20030206ACK, as amended.

provides enhanced FM service to a substantial area and population and the Commission recognized that in its Order.

The engineering exhibits submitted in this proceeding clearly demonstrate that KMKS(FM) can continue to serve its community of license with whatever technical facilities it desires, either as a Class C2 facility or a Class C1 facility. The only technical conflict that exists is whether that operation will be authorized on **FM** Channel 273C(1 or 2) or on FM Channel 259(1 or 2), and GBC believes that the assignment of FM Channel 259C2 to Bay City, Texas, (where it can operate as either a Class C2 or Class C1 facility), and the adoption of the GBC proposal serves the public interest more than the mere retention of **FM** Channel 273C1 at Bay City, Texas where it has laid fallow for more than 10 years.

The foregoing statements are true and correct to the best of this affiant's belief and are made in good faith. My qualifications are a matter of record before the Commission.

Dated this 4<sup>th</sup> day of April, 2003.

Respectfully,

A handwritten signature in black ink, appearing to read "F. W. Hannel", written over a horizontal line.

F. W. Hannel, PE

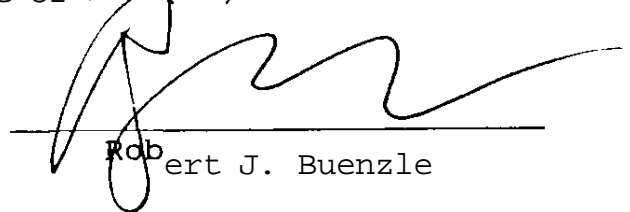
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CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Reply to Opposition to Petition for Reconsideration have been served by United States mail, postage prepaid this 7th day of April, 2003, upon the following:

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Robert J. Buenzle

\* Copy Also Served by Fax